

APPEAL NO. 021470
FILED JULY 17, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 29, 2002. The hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is \$310.38. The claimant appeals the determinations on legal and factual sufficiency grounds. The respondent (carrier) urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant's AWW is \$310.38. Section 408.041 governs the calculation of AWW. The claimant argues that a fair, just, and reasonable method should be applied in this case, or, in the alternative, the claimant's AWW should be determined using the wages of a similar employee. Before applying a fair, just, and reasonable method for calculating AWW, it must be determined that the employee has lost time because of the irregular nature of his employment or due to a cause beyond the employee's control. Texas Worker's Compensation Commission Appeal No. 011200, decided July 12, 2001, citing Section 408.041(c). It is undisputed that the claimant did not work for the employer five of the 13 consecutive weeks immediately preceding the date of injury. The claimant testified that the lost time was due to a lack of work with employer. The carrier provided evidence that the claimant's lost time was due to a voluntary leave of absence. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer found that the claimant's lost time was due to a voluntary leave of absence. In view of the evidence presented, we cannot conclude that this determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Accordingly, a fair, just and reasonable method for calculating AWW could not be used in this case.

The question remains whether the claimant's AWW could be calculated based on the wages of a similar employee, under Section 408.041(b). The claimant provided no evidence of what wages a same or similar employee would make in the record of this proceeding. Thus, the hearing officer properly calculated the claimant's AWW, pursuant to Section 408.041(a), by dividing the sum of the wages paid in the 13 weeks immediately preceding the date of injury by 13.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **EMPLOYERS INSURANCE COMPANY OF WAUSAU** and the name and address of its registered agent for service of process is

**RICK KNIGHT
105 DECKER COURT, SUITE 600
IRVING, TEXAS 75062.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge